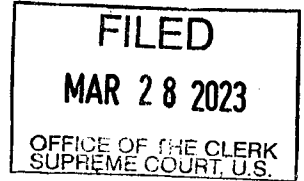


22-960
No.

ORIGINAL

In the
Supreme Court of the United States



CHRISTEN ROBINSON KELLEY,
Petitioner,

v.

CATHERINE HOWDEN AND
GEMA/HOMELAND SECURITY,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Christen Kelley
Petitioner Pro Se
224 Colony Way, Apt. 1A
Cornelia, GA 30531
(678) 628-8831
christenr88@gmail.com

March 29, 2023

SUPREME COURT PRESS

♦ (888) 958-5705 ♦

BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. Did the District Judge err by granting summary judgment against Ms. Kelley's 42 U.S.C. § 1981 and the 14th Amendment?
2. Did the District Judge err by granting summary judgment against Ms. Kelley's Title VII claim?
3. Did the District Judge err by granting summary judgment against Ms. Kelley's retaliation claim.
4. Did the District Judge err by granting summary judgment against Ms. Kelley's Mixed-Motive claim.

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant Below

- Christen Robinson Kelley

Respondents and Defendants-Appellees Below

- Catherine Howden
- GEMA/Homeland Security

LIST OF PROCEEDINGS

United States Court of Appeals for the Eleventh Circuit
No. 21-13573

Christen Robinson Kelley, *Plaintiff-Appellant*, v.
Catherine Howden, GEMA/Homeland Security,
Defendants-Appellees; The State of Georgia, *Defendant*.
Date of Final Opinion: November 29, 2022

United States District Court,
Northern District of Georgia
No. 1:19-CV-4429-WMR

Christen Robinson Kelley, *Plaintiff*, v. Catherine
Howden, Gema/Homeland Security, *Defendants*.
Date of Final Order: September 20, 2021

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit, dated November 29, 2022, is included in the Appendix at App.1a. The Order of the United States District Court for the Northern District of Georgia, dated September 20, 2021, is included at App.17a. The Order adopting the Magistrate Report and Recommendation, dated July 8, 2021, is included at App.34a. These Opinions were not designated for Publication.



JURISDICTION

The Court of Appeals entered its Opinion on November 29, 2022 (App.1a). The Court provided an extension through to March 29, 2023. Sup. Ct. No. 22A769. This Court has jurisdiction under 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

All relevant Constitutional and Statutory Provisions are included in the Appendix. (App.84a)

- U.S. Const. amend. XIV (App.84a)
- 42 U.S.C. § 1981 (App.84a)
- O.G.C.A. 45-20-1(b)(1) (App.85a)
- Ga. Comp. R. & Regs. Rule 478-1-.14 (App.85a)



INTRODUCTION

The Georgia legislators passed O.C.G.A. § 45-20-1 to eliminate employment discrimination within most state agencies and departments. To fulfill this goal, the State Personnel Board was created. The State Personnel Board created Rule 14. Rule 14 is a mandatory rule supervisor should follow. Rule 14 requires a sequence of actions that supervisors take when interacting with employees about their performance. Once a supervisor follows the steps in Rule 14, the results are used to determine if an employee can be promoted.

Ms. Catherine Howden worked as the supervisor for Ms. Christen Robinson Kelley. Ms. Howden did not follow Rule 14 as a supervisor. Ms. Howden promoted employees according to her subjective criteria. However, Ms. Howden denied Ms. Kelley's request to be promoted. According to Ms. Howden, Ms. Kelley's work performance doesn't meet her subjective criteria.

The district judge granted summary judgment in favor of Ms. Howden. The district judge ruled Ms. Howden was allowed to violate the rules of the State Personnel Board. The district judge rules Ms. Howden is permitted to replace the State Personnel Board rules with her subjective criteria. The district judge concludes Ms. Howden didn't discriminate against Ms. Kelley because the same personal criteria were used for all employees. The district judge ruled Ms. Howden truly believed Ms. Kelley's work was deficient. The district judge doesn't apply a reasonable person standard to judge Ms. Howden's belief.

Such a ruling by the district judge is an error. The McDonnell Douglas analysis does not allow a public official to violate state law. The McDonnell Douglas analysis should be applied within the boundaries of state law.

For example, the United States Supreme Court has ruled gay people have a right to marry. The Clerk of Probate Court in Fulton County doesn't want gay couples to marry. The Clerk decides that she will prevent gay people from getting married by denying a marriage license to gay and heterosexual couples she doesn't believe are in love.

A heterosexual couple applies for a marriage license. The Clerk asks the heterosexual couple questions to determine if they are genuinely in love. The Clerk concludes the heterosexual couple is in love, so she grants the marriage license.

A gay couple applies for a marriage license the following week. However, the Clerk decides the gay couple is not in love and denies the marriage license. The Clerk asked the gay couple the same questions she asked the heterosexual couple.

The gay couple sues the Clerk for violating the equal protection clause of 42 U.S.C. § 1981. The gay couple argues they are similarly situated to the heterosexual couple who received a marriage license. The district judge decides the gay couple is not similarly situated to the heterosexual couple. The district judge ruled the Clerk had an honest belief the gay couple isn't in love. The gay couple appealed to the Eleventh Circuit.

If this Court adopts the district judge's logic, Title VII, 42 U.S.C. § 1981, and the 14th Amendment would no longer protect people from discrimination.



STATEMENT OF THE CASE

A. Course of Proceedings

On October 3rd, 2019, Ms. Christen Robinson Kelley filed a complaint against Catherine Howden and GEMA/Homeland Security. (Document 2) On February 3rd, 2020, Ms. Kelley filed an amended complaint. (Document 17). On December 15th, 2020, Ms. Howden and GEMA filed a motion for summary judgment. (Document 89). On January 1st, 2021, Ms. Kelley filed a motion in opposition to summary judgment. (Document 99).

On July 8th, 2021, the magistrate judge issued a final report and recommendation stating summary judgment should be granted. (Document 105). On July 21, 2021, Ms. Kelley filed her objections to the final report and recommendation. (Document 107). On September 20th, 2021, the district court issued an order granting summary judgment. (Document 110). Ms. Kelley filed her notice of appeal on October 15th, 2021. (Document 112).

B. Statement of the Facts

The State of Georgia passed O.C.G.A. § 45-20-1 to establish a system of personnel administration that will attract, select, and retain the best employees based on merit, free from coercive political influences, with incentives in the form of equal opportunities for

all. To achieve this purpose, it is the policy of the State that agencies treat all employees under the following principles: Assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to race, color, national origin, sex, age, disability, religious creed, or political affiliations. This "fair treatment" principle includes compliance with all state and federal equal employment opportunities and nondiscrimination laws. See O.C.G.A. § 45-19-20 (B)(1).

In the case sub judice, GEMA and Ms. Catherine Howden failed to follow Georgia law. Ms. Christen Robinson worked under Ms. Howden for almost two years while Ms. Howden refused to implement the rules of the State Personnel Board. Not implementing the regulations of the State Personnel Board allowed Ms. Howden to discriminate against Ms. Kelley. Ms. Howden discriminated against Ms. Kelley by denying her request to be promoted. Ms. Kelley was not promoted until GEMA removed Ms. Howden as Ms. Kelley's supervisor.

C. Standard of Review

De Novo. The Court gives no deference to the lower Court's decision and applies the same standard as the district court. *Whatley v. CAN Ins. Co.*, 189 F.3d 1310, 1313 (11th Cir. 1999).



REASONS FOR GRANTING THE PETITION

I. THE DISTRICT JUDGE ERRED BY GRANTING SUMMARY JUDGMENT FOR THE 42 U.S.C. § 1981 AND 14TH AMENDMENT CLAIMS.

In Count IV of her amended complaint, Ms. Kelley brings a claim of the denial of the equal benefit of all laws and proceedings under 42 U.S.C. § 1981. (Document 17 p. 16). In Count V, Ms. Kelley alleges the denial of equal protection under the 14th Amendment. (Document 17 p.16). There is direct evidence of discrimination because Ms. Howden intentionally did not follow proceedings designed to prevent discrimination without any justification. See O.C.G.A. §§ 45-20-1, 45-20-3, 45-20-3.1, 45-20-4, and 45-20-21. See also (Exhibit 1) (Exhibit 2).

“Direct evidence, in the context of employment discrimination law, means evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic.” *Wright v. Southland Corp.*, 187 F.3d 1287, 1293 (11th Cir. 1999).

Ms. Kelley admits this Court is not a super-human resource department. However, it's the Court's responsibility to interpret the law. See *Marbury v. Madison*, 5 U.S. 137 (1803). The Court can conclude there is direct evidence of discrimination because of the following: (1) the purpose of the statute is to eliminate employment discrimination, (2) Ms. Howden and GEMA must follow the law, and (3) there is no nondiscriminatory reason for Ms. Howden and GEMA

not to follow the law. A reasonable jury can conclude Ms. Howden did not follow the law because not following the law allows her to discriminate against Ms. Kelley.

First, the Court should have no problem ruling the purpose of O.C.G.A. § 45-20-1(b)(1) is to eliminate discrimination within state agencies. The Court can reach this conclusion because the statute's plain language says it aims to eradicate employment discrimination. *Id.*

Secondly, the Court should have little trouble concluding its mandatory for Ms. Howden and GEMA to follow Georgia statutes and State Personnel Board rules. The State Personnel Board can establish personnel policies for state agencies. *See* O.C.G.A. § 45-20-3(a)(1), (b)(2).

The State Personnel Board can also make employment rules for the agencies. *See* O.C.G.A. § 45-20-3.1(c). The plain language of the statute states, "the courts shall take judicial notice of any rule which has become effective pursuant to this chapter." *Id.* at (g) (emphasis added).

Additional, the statute states, "such rules and regulations when approved by the Governor shall have the force and effect of law and shall be binding upon the state departments covered by this article. . . ." O.C.G.A. § 45-20-4(2) (emphasis added).

Most importantly, the State Personnel Board has established policy guidelines concerning the enforcement of its rules. Rule 478-1-.0(7) states:

The State Personnel Board has established rules, policies, and procedures to ensure

that operations are conducted in a consistent, quality manner and that employees can serve the public effectively. Employees are expected to comply fully with these policies and procedures. When an employee violates a rule, policy, or procedure, the employee's Agency, and the Department of Administrative Services, if appropriate, should consider the circumstances under which the violation occurred and take appropriate action. Appropriate action may result in discipline, up to and including termination of employment, and/or ineligibility for future employment with the Agency and/or State. Employees are responsible for reporting suspected violations of policies to the Commissioner.

(Exhibit 46 p. 3 #7) (emphasis added).

In compliance with Georgia laws, the State Personnel Board created Rule 478-1-14 ("Rule 14") (Exhibit 1). Throughout Rule 14, the verb shall describe the duties Ms. Howden must follow. Rule 14 uses the verb shall a total of four times. (Exhibit 1 p. 2, 4, and 5) ("yellow highlights").

In compliance with Rule 14, GEMA implemented a Performance Management Policy ("PMP") (Exhibit 2). GEMA's PMP uses the verb shall a total of seven times throughout the policy. (Exhibit 2 p. 1, 4, and 5) ("blue highlights").

The PMP "requires a sequence of actions that supervisors take when interacting with employees about their performance." (Exhibit 2 p. 2) (emphasis added). ("green highlights"). The four components of the PMP are: (a) Performance planning, (b) performance

coaching, (c) Performance evaluation, and (d) Performance recognition. (Exhibit 2 p. 2-3).

Without any legal analysis, the magistrate judge ruled Ms. Howden and GEMA had an honest good faith belief the rules of the State Personnel Board are not mandatory. (Document 105 p. 45 Footnote 25). Ms. Kelley objected to the magistrate judge's final report and recommendation. (Document 107 p. # 12).

A plaintiff can show pretext by presenting evidence from which a reasonable jury could find that Defendant did not honestly believe the facts upon which he allegedly based his nondiscriminatory decision. *Holland v. Gee*, 677 F.3d 1047, 1060 (11th Cir. 2012).

One way to prove dishonest belief is for Ms. Kelley to present evidence that "no reasonable person, in the exercise of impartial judgment, could believe following state law and rules are not mandatory." *Woodard v. Fanboy, L.L.C.*, 298 F.3d 1261, 1266 (11th Cir. 2002).

In response to Defendant's Statement of Material Facts, Ms. Kelley objected to Defendant's statement, saying it wasn't mandatory to follow state law. (Document 97-3 p. 12 ¶ 15). Ms. Kelley also raised this issue in her objections to the magistrate judge's final report and recommendation. (Document 107 p. 1).

The Supreme Court of Georgia has held that the word "shall" is to be generally construed as a mandatory directive for purposes of statutory construction. *Southern Crescent Newspapers v. Dorsey*, 269 Ga. 41, 45(3) (Ga. 1998), *State v. Henderson*, 263 Ga. 508, 510 (Ga. 1993), and *Baylis v. Daryani*, 294 Ga. App. 729, 730 (Ga. App. 2008) (The general rule is that "shall" is recognized as a command and is mandatory).

The magistrate judge ruled the Defendants did not perceive the personnel supervisory procedures to be mandatory on its supervisors. (Document 105 p. 45 footnote 25). Ms. Kelley objects to such a ruling by the magistrate judge. The magistrate judge should use a reasonable person standard. (Document 107 p. 9 #12). A jury can conclude Ms. Howden did not honestly believe she didn't have to follow state law. A reasonable jury can reach this conclusion because a reasonable person reading the rules would know it's mandatory to follow the rules.

Mr. Mark Sexton testifies that supervisors do not have the discretion not to follow the guidelines. (Sexton Dep. 21:6-9). Mr. Sexton doesn't know why the procedures were not followed for Ms. Kelley between October 2016 through August 2018. (Sexton Dep. 21:10-13).

Mr. Sexton admits GEMA uses Rule 14 for performance evaluations. (Exhibit 1) (Sexton Dep. 12:13-19). Mr. Sexton admits that GEMA's performance evaluations must comply with Rule 14. (Sexton Dep. 12:24-13:4). Mr. Sexton admits a Performance Improvement Plan is not the same as an Individual Development Plan. (Exhibit 1) (Sexton Dep. 13:15-25). With these facts, a reasonable jury can conclude racial animus, more probably than not, is the reason why GEMA refused to follow the law.

Ms. Howden's declaration doesn't mention one word concerning why she didn't implement the Performance Planning while she supervised Ms. Kelley at GEMA. At her deposition, Ms. Howden admits she has seen Rule 14 before. (Howden Dep. 11:7-9) (Exhibit 1). Ms. Howden admits she has heard about the Rules of the State Personnel Board. (Howden Dep. 11:10-12).

Ms. Howden doesn't have any reason to believe GEMA doesn't have to follow the guidelines listed in Rule 14. (Howden Dep. 11:17-20). Ms. Howden admits she doesn't have any reason to believe it wasn't mandatory to follow Rule 14. (Howden Dep. 12:1-7). Ms. Howden admits it's mandatory for her to follow GEMA's Performance Planning policy. (Howden Dep. 12:21-24). The district judge's order granting summary judgment should be reversed.

II. THE DISTRICT JUDGE ERRED BY GRANTING SUMMARY JUDGMENT FOR MS. KELLEY'S FAILURE TO PROMOTE CLAIM (TITLE VII).

Ms. Kelley's Title VII claim against GEMA is a failure to promote claim. The district judge applied the McDonnell Douglas analysis. The district judge ruled Ms. Kelley is not similarly situated to Ms. Regeski and Ms. Sneider. The district judge ruled Ms. Kelley is not similarly situated because of differences in prior work experience and deficiencies in her work product. Such a ruling by the district judge is an error.

This Court has held whether employees are similarly situated is determined on a case-by-case basis. *See Lewis v. City of Union City*, 918 F.3d 1213, 1227 (11th Cir. 2019). The cases cited by the district judge are distinguishable from Ms. Kelley's case. The issues are different because Title 45 and the State Personnel Board rules don't apply to all departments and agencies. *See O.C.G.A. 45-20-2(6)*.

Vinson v. Tedders, 844 F. App'x 211 (11th Cir. 2021), is a case dealing with an employee in the Macon-Bibby County Tax Commissioner's Office. Title 45 and the State Personnel Board rules do not apply to such departments. *See O.C.G.A. 45-20-2(6)*. Therefore,

Macon-Bibb County did not have to comply with Title 45 and State Personnel Board rules.

Crawford v. Carroll, 529 F.3d 961 (11th Cir. 2008) is a case concerning a Georgia State University (GSU) employee. Title 45 clearly states the terms “department” and “agency” “. . . shall not include . . . the board of regents.” *Id.* (emphasis added). The Board of Regents sets policies for GSU. See O.C.G.A. 20-12-3. Therefore, Title 45 and State Personnel Board rules did not apply in that case. Deciding which employees are similarly situated to Ms. Kelley must be determined within the limits of Title 45 and the State Personnel Board rules.

There are only three relevant factors to decide if the Comparators were similarly situated in all material respects to Ms. Kelley on January 30, 2018. Those three substantial factors are (1) subject to the same rules, (2) the same supervisor; and (3) performing the same job duties and responsibilities. (Document 99-1 p. 17).

This Court must interpret the rules and decide which factors are material when an employee is promoted. It’s undisputed Ms. Kelley, Ms. Regeski, and Ms. Sneider were supervised by Ms. Howden. It’s also undisputed all three are subject to the same rules.

On January 30, 2018, the policy concerning promotions states, “there is no set schedule for promotions from one level to the next. Each individual progresses at his/her own speed and within budget and assignment restrictions.” (Document 97-23) (Document 97-3 p. 26, 27, and 28).

Employees are promoted based on their progress, not by other coworkers’ progress or work experience. Ms. Kelley, Ms. Sneider, and Ms. Regeski are similarly

situated because this rule applies to all three. It's clear from this rule that Ms. Regeski and Ms. Sneider's work experience is not material to decide if they are similarly situated with Ms. Kelley.

On January 30, 2018, the policy states, "promotions . . . should be consistent with the most recent overall rating of the employee's performance." (Document 93-1 p. 6 #M). Rule 14 states, "performance rewards are based on employee rating, and availability of funds are appropriated on an annual basis. . . ." (Document 93-1 p. 5). Rule 14 explains which categories are used to rate an employee's work performance. (Document 93-1 p. 4).

Ms. Kelley wants this Court to understand that ratings are very critical. The use of a rating is essential throughout Rule 14. For example, the Rule states, "To ensure that employee ratings are applied consistently across divisions, the Director or his designee must conduct an annual review and evaluation of the Agency's performance management program." (Document 93-1 p. 6). Rule 14 describes the statewide core competencies in which all employees should be rated. (Document 94-2 p. 3). The policy says, "a summary rating reflective of the overall level of performance, shall be assigned to each evaluation." (Document 93-1 p. 4).

It was an error for the district judge to allow Ms. Howden to replace the State Personnel Board's rating system with her subjective criteria to deny Ms. Kelley a promotion. The district court used Ms. Howden's criteria to conclude Ms. Kelley isn't similarly situated. (Document 110 p. 9).

Ms. Howden doesn't have the authority to deny Ms. Kelley a promotion without following the rating system. Ms. Howden is a state employee, and she has an ethical duty to follow state law. *See* O.C.G.A. 45-10-1 (II).

Human Resource Generalist Dr. Lauren Huff testifies the rating scale is important for an employee's career path. It isn't easy to allow employees to move up in their careers without a rating scale. (Huff Dep. 19:17-20:16) (Document 97-2 p. 45 # 170). Dr. Huff testifies its mandatory for supervisors to follow the Performance Management Process. (Huff Dep. 17:2-19) (Document 97-2 p. 44 # 167). The district judge's order granting summary judgment should be reversed.

III. PRETEXT.

Along with her prima facie case of discrimination, Ms. Kelley can use several theories to prove racial animus motivated Ms. Howden and GEMA's decision. These theories should be viewed as a whole, not individually. Furthermore, the order of the argument doesn't indicate the importance of the approach. Together, the theories create a convincing mosaic of circumstantial evidence. *See Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 766 (7th Cir. 2016) (All evidence belongs in a single pile and must be evaluated as a whole. That conclusion is consistent with *McDonnell Douglas* and its successors).

A. Failure to follow Georgia law.

A reasonable jury can conclude racial animus motivated GEMA because the agency failed to follow Georgia law. Courts have held the failure to follow company policy can prove pretext. *See Holland v. Gee*,

677 F.3d 1047, 1060 (11th Cir. 2012); *Woodard v. Fanboy, LLC*, 298 F.3d 1261, 1267 (11th Cir.2002); and *Pears v. Mobile County*, 645 F.Supp.2d 1062, 1092 (SD Ala. 2009).

There is no question GEMA had to implement the performance improvement plan. See O.C.G.A. § 45-20-21. Rule 478-1-0(7) states the rules of the State Personnel Board must be followed. (Exhibit 46 p. 3 #7). The failure to follow steps to prevent discrimination is proof of discrimination.

B. Lack of documentation.

A reasonable jury can conclude racial animus motivated GEMA not to promote Ms. Kelley and pay her a salary equal to Ms. Regeski and Ms. Sneider. A reasonable jury can reach this conclusion because no documents support GEMA's alleged reasons why Ms. Kelley's pay wasn't equal to her comparators and why she wasn't promoted in January 2018. Lack of documentation can prove pretext. See *Laxton v. Gap Inc.*, 333 F.3d 572, 580 (5th Cir. 2003); and *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 240 (5th Cir. 2015).

Rule 14 requires agencies to document employees' competencies, goals, job responsibilities, and expectations. (Exhibit 1 p. 2f.). GEMA doesn't have any documents showing Ms. Regeski or Ms. Sneider's job duties and responsibilities differed from Ms. Kelley's. GEMA doesn't have one email or work assignment different from Ms. Kelley. The work assignments turned over by GEMA demonstrate they all were creating newsletters. (Exhibit 37) (Exhibit 38) (Exhibit 39).

GEMA doesn't have any documents demonstrating Ms. Regeski or Ms. Sneider's work performance was better than Ms. Kelley's. Rule 14 requires agencies to keep records of an employee's work performance. (Exhibit 1 p. 4 (6)). The documents GEMA turned over demonstrates supervisors made edits to everyone's work assignments. (Exhibit 37) (Exhibit 38) (Exhibit 39). No records prove Ms. Kelley's writing was worse than her coworkers.

The documents attached to Ms. Howden's declaration are work assignments edited in the early spring of 2017. (Kelley Decl. 5). GEMA has failed to present any work assignments after July 3, 2017, showing Ms. Kelley's work performance was poor. GEMA concluded Ms. Kelley was performing her job duties satisfactorily in July of 2017. (Exhibit 34). There are no documents after that date showing she wasn't.

Ms. Howden doesn't have any documents from her meeting with Ms. Kelley in November 2017. Rule 1 requires supervisors to document their coaching meetings. (Exhibit 1 p. 3 (b)(1.)(2.)). Ms. Kelley testifies Ms. Howden couldn't give her one example showing poor work performance during the November 2017 meeting. The lack of documentation supports Ms. Kelley's testimony.

C. GEMA's Willingness to Bend the Rules for Non-African Americans.

A reasonable jury can conclude that racial animus motivated GEMA because of the agency's willingness to bend non-African Americans' rules. GEMA bent the rules and gave Ms. Regeski the MRS2 position when she didn't qualify for the job. (Exhibit 21 p.1). A person must have two years of related experience

to be eligible for the MRS2 position. (Exhibit 6). However, Ms. Howden's declaration states she gave Ms. Regeski an MRS2 job when she only had a year-and-a-half of related work experience. (Doc. 89-5 p. 15 ¶ 48).

Ms. Howden gives Ms. Sneider a promotion within one month of working for GEMA. (Doc. 89-5 p. 15 ¶ 43). Ms. Howden promoted Ms. Sneider without implementing a criteria-based adjustment plan. The rule clearly states a plan must specify the established criteria to be eligible for a salary adjustment. (Exhibit 43 p.4 (d)). Any such project must be in writing so the Commissioner can audit the plan. (Exhibit 43 p. 4 (d)).

Additionally, Ms. Howden was required to use the performance management form to give Ms. Sneider a salary increase. "A PMF must be completed and signed not more than 90 days before the effective date of a salary increase. (Exhibit 13 p. 1 #4) (yellow highlights).

GEMA argues Ms. Kelley didn't apply for the promotion in January 2018; therefore, she doesn't have a prima facie case. However, GEMA gives Ms. Sneider two promotions, although she never applied for the job positions. (Exhibit 36) (Exhibit 45).

Lastly, under Georgia law, public employees should "give a full day's labor for a full day's pay and give to the performance of his duties his earnest effort and best thought." OCGA § 45-10-1 (III) . GEMA puts Ms. Kelley on a PIP for allegedly not meeting this standard; however, other employees are not given the same treatment.

As a supervisor, Ms. Howden should have followed the policies outlined in Rule 14. (Howden Dep. 11:17-12:7). Ms. Howden admits it was mandatory to follow the guidelines in GEMA's PMP. (Howden Dep. 12:20-

13:5). Ms. Howden testifies nothing gave her reason to believe she didn't have to follow the rating scale in GEMA's PMP. (Howden Dep. 14:4-10). However, Ms. Howden didn't follow policies within her five years of working for GEMA. (Howden Dep. 21:1022).

Although Ms. Howden didn't follow the rules at GEMA, she was not placed on a PIP for not following the rules. Ms. Howden received a salary increase the entire time she worked for GEMA. (Exhibit 40). A reasonable jury can conclude Ms. Howden received salary increases, although she didn't follow the rules because she is white.

Mr. Joey Green works for GEMA as legal counsel. (Sexton Dep. 8:20-23). Ms. Howden testifies she showed Mr. Green the PIP before putting Ms. Kelley on the PIP. Ms. Howden testifies Mr. Green agrees with the PIP. (Howden Dep. 42:19-43:2). As legal counsel, Mr. Green didn't inform GEMA the agency needs to follow the State Personnel Board's rules. A reasonable jury can conclude Mr. Green wasn't placed on a PIP for failing to do his job properly because he is white.

Dr. Huff testifies its mandatory for supervisors to follow the Performance Management Process. (Exhibit 2 p. 2 IV D.) (Huff Dep. 17:2-19). Dr. Huff admits GEMA's policies cannot be the opposite of Rule 14. (Exhibit 1) (Huff Dep. 10:22-11:6). Dr. Huff testifies GEMA doesn't discipline supervisors for not using the Performance Management Process. Supervisors receive no punishment. (Exhibit 1 p. 2 # 4) (Huff Dep. 13:3-23). A reasonable jury can conclude GEMA allows its white employees to violate rules without punishment, but Ms. Kelley is punished for her alleged shortcomings because she is African American.

D. Lack of Honest Good Faith Belief.

A reasonable jury can conclude Ms. Howden did not honestly believe Ms. Kelley had poor work performance. A reasonable jury can conclude that racial animus was the reason why Ms. Kelley was placed on a PIP. A reasonable jury can reach this conclusion because Ms. Howden waited seven months before putting Ms. Kelley on a PIP. According to Ms. Howden's declaration, she noticed Ms. Kelley had poor work performance in the summer of 2017. (Doc. 89-5 p. 5 # 12).

The work examples attached to her declaration are from March and April 2017. (Kelley Decl. ¶ 5). However, Ms. Howden didn't put Ms. Kelley on a PIP until she asked for her salary to equal her comparators. The timing of the PIP allows a jury to believe intentional discrimination is the real reason why Ms. Kelley is put on a PIP.

The Eleventh Circuit has held that timing is essential to show a causal connection between two events. *See Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007) (A three to a four-month disparity between the statutorily protected expression and the adverse employment action is not enough.) If a plaintiff cannot prove a prima facie case with a three or four-month gap, an employer should not be able to establish a legitimate, nondiscriminatory reason with a seven-month gap.

Ms. Howden has failed to provide the Court with an example of Ms. Kelley's poor performance after July 5, 2017. On July 5, 2017, GEMA gave Ms. Kelley a 2% raise with her coworkers because she was performing satisfactory work. (Exhibit 41). GEMA would need to show work examples after July 5, 2018, to establish a

causal connection to the February 2018 PIP. The lack of a causal link between the work assignments and the PIP is proof of racial animus.

E. Ms. Howden Putting Ms. Kelley Under Surveillance Shows Racial Animus.

A reasonable jury can conclude racial animus is motivating GEMA because Ms. Howden placed Ms. Kelley under surveillance, although she was no longer her direct supervisor. Courts have held placing an employee under surveillance to find a reason to punish the employment supports pretext. *See Jones v. Potter*, 488 F.3d 397, 408 (6th Cir. 2007) (noting that an employer cannot conceal an unlawful discharge by closely observing an employee and waiting for an ostensibly legal basis for discharge to emerge); and *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 921 (C.A.11 (Fla.), 1993).

Ms. Howden placed Ms. Kelley under surveillance by questioning Dr. Huff concerning Ms. Kelley using telework. Ms. Howden had Ms. Kelley under surveillance, although she was no longer her direct supervisor. Dr. Huff explains that Ms. Howden could not treat Ms. Kelley differently from other employees who teleworked. (Huff Dep. p. 47:4-19). Such action by Ms. Howden shows racial animus.

F. Ms. Howden's Subjective View of Ms. Kelley's Work Performance Is a Pretext.

A reasonable jury can believe racial animus motivates Ms. Howden because her opinion of Ms. Kelley's work performance is purely subjective. Usually, the subjective views of a supervisor are allowed.

However, Rule 14 has taken away a supervisor's purely subjective view of an employee's work performance.

GEMA should have an Agency Review Official. It's the job of an Agency Review Official "to render a decision to either uphold or direct the responsible supervisor to revise the performance plan or rating." (Exhibit 1 p. 4 (5)(c)). The Agency Review Official reviewing a particular plan or evaluation should be familiar with the work described and must not be a first-or-second-level supervisor of the employee requesting the review. (Exhibit 1 p. 4 (5)(c)).

In this case, no Agency Review Official has confirmed Ms. Howden's opinion of Ms. Kelley's work performance. Ms. Sexton testifies that Mr. Hoy was the Agency Review Official and never told him anything negative about Ms. Kelley's work performance. (Sexton Dep. 33:7-12). Dr. Huff testifies GEMA doesn't have a person who acts as the Agency Review Official. (Exhibit 1 p. 4) (Huff Dep. 14:2515:7). A reasonable jury can conclude the absence of an Agency Review Official supporting Ms. Howden's opinion is proof of racial animus.

IV. THE DISTRICT JUDGE ERRED BY GRANTING SUMMARY JUDGMENT TO THE RETALIATION CLAIM.

In Count III, Ms. Kelley is bringing a claim of retaliation according to 42 U.S.C. § 1981. *See CBOCS West v. Humphries*, 553 U.S. 442, 457 (2008). The elements required to establish retaliation claims under § 1981 are the same as those required for Title VII claims. *See Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1277 (11th Cir. 2008).

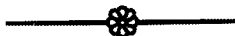
In November, Ms. Kelley complained to Ms. Howden that she treated her differently from her team-

mates. (Kelley Dep. 124:6-125:4) (Kelley Dep. 292:4-8). Such complaint to Ms. Howden is a charge of discrimination under 42 U.S.C. § 1981. Ms. Howden did not stop treating Ms. Kelley differently after the November meeting. In January of 2018, Ms. Kelley asked that her salary be equal to her coworkers.

In response to the request, Ms. Howden puts Ms. Kelley on a PIP. Ms. Howden had never received any training on creating a PIP. (Howden Dep. 38:2-5). Ms. Howden had never written a PIP before February 8th, 2018. (Howden Dep. 38:6-8). GEMA doesn't have a policy explaining when an employee should be put on a PIP. (Howden Dep. 37:23-38:1). Ms. Kelly could not receive her \$45,000 employment increase in February of 2018 because Ms. Howden put her on a PIP. (Howden Dep. 38:9-20). The PIP is nothing but retaliation for Ms. Kelley asking that her salary be equal to her comparators.

V. THE DISTRICT JUDGED ERRED BY GRANTING SUMMARY JUDGMENT FOR THE MIXED MOTIVE CLAIM.

Ms. Kelley incorporates the arguments supporting 42 U.S.C. § 1981 and Title VII arguments as if stated herein. The order granting summary judgment should be denied.



CONCLUSION

There are genuine issues of material fact for the reasons stated above, and the Court should reverse the order granting summary judgment.

Respectfully submitted,

Christen Kelley
Petitioner Pro Se
224 Colony Way, Apt. 1A
Cornelia, GA 30531
(678) 628-8831
christenr88@gmail.com

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